

Message Text

PAGE 01 STATE 107878
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C O N F I D E N T I A L STATE 107878

E.O. 11652: GDS

TAGS: MARR, NATO

SUBJECT: AD HOC COMMITTEE ON TAX EXEMPTION OF MILITARY
HEADQUARTERS AND PERSONNEL - PROPOSED DRAFT REPORT TO
COUNCIL

REF: NATO 3919

1. DEPT SHARES MISSION'S CONCERN OVER APPARENT LACK OF
CONFIDENTIAL

PAGE 02 STATE 107878

RESOLUTION PRESENTED BY CHAIRMAN'S DRAFT REPORT TRANS-
MITTED BY REFTTEL, AS WELL AS DIRECTION THE REPORT LEANS.
MISSION IS REQUESTED TO QUERY UK AND CANADIAN DELEGATIONS
TO DETERMINE THEIR REACTION TO LATEST DRAFT AND ADVISE
DEPT ASAP.

2. COMMENTS ON SPECIFIC PARTS OF DRAFT REPORT ARE AS
FOLLOWS:

A. PARA 5. THE EXCEPTION TO THE RULE THAT HEADQUARTERS
ARE EXEMPT FROM "DUTIES AND TAXES"--NOT "SOME TAXES," AS

THE DRAFT REPORT STATES--IS NOT WHETHER SUCH TAXES ARE "SHOWN TO BE NECESSARY AND JUSTIFIED," BUT RATHER THAT THEY ARE CHARGES FOR SERVICES RENDERED. THIS IS THE CLEAR IMPORT OF PARA 4 OF ARTICLE VIII OF THE PARIS PROTOCOL AND IT IS THE ONLY EXCEPTION TO THE GENERAL EXEMPTION OF THAT ARTICLE. MOREOVER, THE BURDEN OF ESTABLISHING THE

QUALIFICATION OF THE "TAX" UNDER THIS EXCEPTION RESTS WITH THE HOST COUNTRY RATHER THAN THE IMH.

B. PARA 6. WE CANNOT AGREE THAT THE PHRASE "SO FAR AS PRACTICABLE" (PARA 1, ARTICLE VIII, PARIS PROTOCOL) COMPELS EXEMPTIONS TO "BE COMPATIBLE WITH THE NATIONAL LEGISLATION IN FORCE IN THE HOST COUNTRY." ACTUALLY THE NEGOTIATING HISTORY OF THE AGREEMENT AND THE CONDITIONS SURROUNDING ITS COMING INTO FORCE INDICATE THAT THE CONTRARY IS TRUE. IT IS OUR EXPRESSED VIEW--IN SUPPORT OF SHAPE LEGAL ADVISER BUYLE'S ARGUMENT--THAT THE PHRASE WAS INSERTED INITIALLY TO PROVIDE MEMBER COUNTRIES SOME TIME TO ADJUST NATIONAL LAWS TO THE DEGREE POSSIBLE TO PERMIT GRANTING EXEMPTIONS. THE EXIGENCIES OF PROMPT ESTABLISHMENT OF IMH AND STATIONING NATO PERSONNEL REQUIRED SOME INITIAL LATITUDE TO ACCOMMODATE THE NEWLY CONFIDENTIAL

PAGE 03 STATE 107878

CREATED OBLIGATION TO PROVIDE TAX EXEMPTION UNDER THE NATO AGREEMENTS. "NATIONAL LEGISLATION IN FORCE" MIGHT HAVE BEEN AN IMPEDIMENT TO SOME COUNTRIES AND THIS CLAUSE WAS DESIGNED TO RECOGNIZE THE NEED FOR TIME TO ADJUST CONTRARY LAWS TO ACCOMMODATE THE NEW UNDERTAKING. IF THE INTERPRETATION WERE OTHERWISE, NATO HOST COUNTRIES COULD FRUSTRATE THE CLEAR OBLIGATION TO PROVIDE TAX EXEMPTION TO IMH THROUGH THE ENACTMENT OF NATIONAL LEGISLATION. THE DUTCH WATER POLLUTION TAX IS A CASE IN POINT. IT WAS NOT "IN FORCE" AT THE TIME OF THE ENTRY INTO FORCE OF THE PARIS PROTOCOL AND IT IS NOT, EVEN UNDER DUTCH INTERPRETATION, A "CHARGE FOR SERVICES RENDERED" BUT RATHER IN THE NATURE OF INDEMNIFICATION FOR DAMAGE TO THE ENVIRONMENT. ACCORDINGLY, IT SEEMS ILLOGICAL NOT TO REACH A CONCLUSION WITH RESPECT TO THIS TAX WHICH WAS THE MODUS VIVENDI OF THE AD HOC COMMITTEE. THE FACT THAT THE DUTCH "CLAIM" IS FORMULATED THROUGH DOMESTIC LEGISLATION IN TERMS OF A "TAX" COMPELS US TO TREAT IT AS A TAX, DESPITE THE INGENUITY OF THE DUTCH REPRESENTATIVE TO EXCEPT IT FROM THE EXEMPTION MANDATE OF ARTICLE VIII UNDER THIS THEORY.

WE CANNOT ACCEPT THE ARGUMENT OF THE SECOND PARAGRAPH OF PARA 6 THAT SUPPLEMENTARY AGREEMENTS BETWEEN IMH AND HOST COUNTRIES "ALONE CAN GIVE MEANING AND SUBSTANCE TO THE PROVISIONS OF ARTICLE VIII." IT IS OUR VIEW THAT THESE SUPPLEMENTARY AGREEMENTS ARE TO ESTABLISH THE

MODALITIES OF IMPLEMENTATION OF THE TAX EXEMPTIONS CON-
FERRED BY ARTICLE VIII. ADMINISTRATION OF SIMILAR TAX
EXEMPTIONS REVEALS A VARIETY OF APPROACHES TO IMPLEMENTA-
TION; I.E., REIMBURSEMENT, IDENTITY CARDS TO AUTHORIZE
EXEMPTION AT TIME OF PURCHASE, CONSOLIDATED PURCHASE BY
EXEMPTED ENTITY, ETC. A CASE IN POINT IS THE SACEUR/NORWAY

SUPPLEMENTARY AGREEMENT APPENDED TO AN INFORMAL NOTE DIS-
TRIBUTED BY THE NORWEGIAN REPRESENTATIVE AT THE DECEMBER
CONFIDENTIAL

PAGE 04 STATE 107878

MEETING. PARA 1, ARTICLE XVI OF THAT AGREEMENT STATES "THE
EXEMPTION FROM DUTIES AND TAXES LAID DOWN IN THE (PARIS)
PROTOCOL, ARTICLE 8 WILL BE IMPLEMENTED AS FOLLOWS:"
A REVIEW OF MOST OTHER SUPPLEMENTARY AGREEMENTS INDICATES
THAT THEY ALSO IMPLEMENT OR AUGMENT THE MORE GENERAL MULTI-
LATERAL AGREEMENTS AND DO NOT DEROGATE FROM OBLIGATIONS
CREATED BY THE MULTILATERAL AGREEMENT UNDER WHICH THEY
WERE CONCLUDED. INDEED, THE FACT THAT THEY ARE STYLED
"SUPPLEMENTARY AGREEMENTS" ARGUES OUR CASE. THUS, THE
DRAFT REPORT IMPLIES MORE INTO THE REQUIREMENT FOR
NEGOTIATING THESE AGREEMENTS THAN WAS ACTUALLY OR IMPLIED-
LY INTENDED BY THE NEGOTIATORS OF THE PARIS PROTOCOL.

THE BASIC FLAW IN THE REASONING OF PARA 6 OF THE DRAFT
REPORT IS THAT IT SUBORDINATES THE VITAL COMMON DEFENSE
REQUIREMENT OF THE ALLIANCE TO THE REVENUE NEEDS OF A
HOST COUNTRY. EVEN A STRAINED INTERPRETATION OF THE
NEGOTIATING REQUIREMENT IN ARTICLE VIII WOULD NOT SUGGEST
AN INTENT TO EFFECT SUCH A SUBORDINATION. THE "WINDFALL
ARGUMENT" ADVANCED DURING THE LAST MEETING WAS TOTALLY
IGNORED IN THE DRAFT REPORT. THERE IS MERIT TO THIS
ARGUMENT BECAUSE, WERE THE RATIONALE OF THE DRAFT REPORT
ACCEPTED, HOST COUNTRIES WOULD GAIN A BOUNTIFUL REVENUE-
PRODUCING SOURCE IN THE FORM OF AN IMH AND THE MEMBERS
OF THE FORCE ASSOCIATED WITH IT.

ANOTHER POINT WHICH THE DRAFT REPORT HAS MISSED--AND PER-
HAPS THE PARTICIPANTS OF THE CONFERENCE AS WELL--IS THE
ONE MENTIONED IN THE MISSION'S COMMENT, NAMELY, THE DUTCH
IDEA THAT THIS IS NEITHER A TAX NOR A SERVICE CHARGE,
BUT RATHER PAYMENT FOR "REPAIR FOR DAMAGE DONE" TO THE
ENVIRONMENT (SEE AC/304-R/2). IF THE DUTCH WANT TO BE
INDEMNIFIED FOR THIS "DAMAGE" THEN A CLAIM MUST BE SUB-
CONFIDENTIAL

PAGE 05 STATE 107878

MITTED. IT SHOULD BE NOTED, HOWEVER, THAT ARTICLE VIII
OF THE NATO STATUS OF FORCES AGREEMENT (LONDON AGREEMENT)
MAKES NO PROVISION FOR INDEMNIFICATION AND LIMITS
LIABILITY OF THE FORCES AND THEIR MEMBERS TO OFFICIAL

DUTY CLAIMS THAT ARE COST-SHARED, NON-OFFICIAL DUTY CLAIMS UNDER EX GRATIA SETTLEMENT, AND OTHER CLAIMS FOR WHICH THE FORCE IS LEGALLY RESPONSIBLE. THUS, TO ESTABLISH AN OBLIGATION TO INDEMNIFY WOULD REQUIRE FORMAL RENEGOTIATION OF ARTICLE VIII.

ALSO, WE ARE DUBIOUS THAT NORMAL SEWAGE POLLUTION FROM AN IMH WOULD CAUSE IDENTIFIABLE DAMAGE OR INJURY FROM WHICH A

SOFA CLAIM WOULD ARISE. TO ESTABLISH SUCH A CLAIM, A HOST COUNTRY WOULD HAVE TO DEMONSTRATE NOT ONLY THAT POLLUTION WAS ATTRIBUTABLE TO IMH, OR ITS PERSONNEL, BUT ALSO THAT IT CAUSED INJURY OR DAMAGE. NEVERTHELESS, IF THE DUTCH BELIEVE THEY CAN SUBSTANTIATE SUCH CLAIMS, THERE ARE PROCEDURES UNDER PARA 5, ARTICLE VIII OF THE LONDON AGREEMENT AVAILABLE FOR THIS PURPOSE. BASED ON THESE POINTS, SOME DISCUSSION OF THE DUTCH THEORY OF THE WATER POLLUTION "DAMAGE" SHOULD BE IN THE REPORT AND SOME VIEW OF ITS MERITS BY THE COMMITTEE.

C. PARA 7 ALSO IS TROUBLESOME AS IT SUGGESTS THAT A TAX WHICH CONTAINS ELEMENTS OF SERVICES RENDERED CANNOT BE ADJUSTED THROUGH NEGOTIATIONS TO PERMIT EXEMPTION FROM THAT PORTION OF IT WHICH IS, BY DEFINITION, A TAX. THE SEPARABILITY PRINCIPLE IS RECOGNIZED BOTH UNDER THE VIENNA CONVENTIONS ON DIPLOMATIC AND CONSULAR RELATIONS (I.E., UK ALLOWANCE OF EXEMPTION FOR THAT PART OF "RATES" ASSESSED AGAINST REAL ESTATE WHICH DOES NOT REPRESENT SERVICES RENDERED) AND IN PRACTICE UNDER BOTH NATO AND BILATERAL MILITARY BASE AGREEMENTS WITH RESPECT TO TAXES OR CHARGES WHICH COMBINE REVENUE PRODUCTION AND SERVICES RENDERED (I.E., THE SPANISH PORT CHARGES AND A VARIETY OF AIRPORT LANDING FEES).

CONFIDENTIAL

PAGE 06 STATE 107878

D. WE CANNOT ACCEPT THE INFERENCE OF PARA 8 OF THE DRAFT REPORT THAT A HOST COUNTRY CAN IMPOSE A TAX ON AN IMH. AGAIN, THIS DOES NOT RECOGNIZE THE CLEAR OBLIGATION TO GRANT EXEMPTION OR ALTERNATIVELY TO DEMONSTRATE THAT THE "TAX" REPRESENTS A CHARGE FOR SERVICES RENDERED.

E. PARA 10 OF THE DRAFT REPORT WAS NOT COMPLETELY TRANSMITTED IN REFTEL. PLEASE SEND SOONEST SO COMMENT CAN BE PROVIDED.

F. IN PARA 11, THE PRINCIPLE THAT "FISCAL EXEMPTION" SHOULD NOT BE EXTENDED TO THOSE TAXES WHICH ARE NOT DIRECTLY RELATED TO THE RESIDENCE OR DOMICILE OF THOSE CONCERNED IS UNOBJECTIONABLE. HOWEVER, THE PRINCIPLE WOULD NOT APPLY TO SUCH TAXES AS THE WATER POLLUTION TAX, WHICH IS DIRECTLY RELATED TO THE RESIDENCE OR DOMICILE

OF THOSE CONCERNED.

G. PARA 13 IS VAGUE. WHAT "EQUIVALENT CRITERIA" SHOULD MEMBER COUNTRIES APPLY "AS REGARDS TAXES RELATED TO THE CONCEPT OF RESIDENCE OR DOMICILE"?

H. DESPITE THE MANY CHANGES MADE TO THE DRAFT REPORT SINCE THE NOVEMBER 1977 VERSION, THE CONCLUSION HAS REMAINED ESSENTIALLY THE SAME. THIS CONCLUSION, WHILE STATING THE OBVIOUS (PROVISIONS OF THE RELEVANT AGREEMENTS "SHOULD BE APPLIED FAITHFULLY AND AS UNIFORMLY AS POSSIBLE THROUGH MEMBER COUNTRIES"), PROVIDES NO CLARIFICATION OF ARTICLE X OF THE LONDON AGREEMENT OR ARTICLE VIII OF THE PARIS PROTOCOL, WHICH WAS THE REQUEST OF THE COUNCIL. MOREOVER, IT ERRS LEGALLY BY SUGGESTING AGAIN THAT THE CONFIDENTIAL

PAGE 07 STATE 107878

"INTEREST OF COMMON DEFENSE" MUST BE "COMPATIBLE WITH NATIONAL LEGISLATION." TO CONFER AUTHORITY UPON MEMBER STATES TO SUBORDINATE THE PARAMOUNT INTERESTS OF COMMON DEFENSE TO THEIR PAROCHIAL REVENUE NEEDS WOULD ULTIMATELY SAP THE VITALITY OF THE ALLIANCE, PRODUCE DISPROPORTIONATE "REVENUE WINDFALLS" ON HOST COUNTRIES AT THE EXPENSE OF STATIONING COUNTRIES, AND UNDULY BURDEN MEMBERS IN ADMINISTRATIVE DETAIL THROUGH UNINTENDED NEGOTIATION REQUIREMENTS UPON THE ENACTMENT OF NEW TAX LEVIES IN A HOST COUNTRY, INCLUDING POLITICAL SUBDIVISIONS.

3. GENERAL COMMENT: U.S. REPRESENTATIVES ON AD HOC COMMITTEE OF EXPERTS ARE DISMAYED THAT DELIBERATIONS EXTENDING OVER A PERIOD OF TEN MONTHS HAVE PRODUCED A DRAFT REPORT OF ALMOST NO SUBSTANCE. MOREOVER, IT CONTAINS ILLOGICAL AND INCORRECT INTERPRETATIONS OF THE PROVISIONS OF THE AGREEMENTS WHICH THIS COMMITTEE WAS CHARGED TO CLARIFY. BECAUSE THE CHAIRMAN APPEARS DETERMINED TO MERGE ELEMENTS OF THE CONFLICTING VIEWS INTO A REPORT WHICH MAKES NO ATTEMPT AT RESOLVING THESE DIFFERENCES, A DISSENTING REPORT WILL BECOME INEVITABLE. ACCORDINGLY, WE WILL CONTINUE TO SUPPORT THE CANADIAN INITIATIVE, IN WHICH THE UK ALSO HAS JOINED, TO INSURE THAT THIS POSITION WILL BE ANNEXED OR APPENDED TO THE REPORT AS A DISSENTING VIEW AND CONSIDERED BY THE COUNCIL.

4. REQUESTED ACTION: (1) PLEASE CONVEY THESE COMMENTS IN WHATEVER DETAIL DEEMED APPROPRIATE TO UK AND CANADIAN NATO MISSIONS. FOR LONDON: PLEASE MAKE THESE COMMENTS AVAILABLE TO JDP BICKFORD, LEGAL ADVISER, FCO, AND REQUEST THAT WE BE PROVIDED WITH ANY MODIFICATION OF THE SEPARATE REPORT TABLED BY CANADIANS AT FEBRUARY MEETING. (2) PLEASE ADVISE AS TO PARLIAMENTARY OR POLITICAL CONSTRAINTS ON COUNCIL REVIEW OF DISSENTING REPORT ALONG WITH MISSION VIEWS.

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PAGE 08 STATE 107878

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